STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County
Court of Common Pleas
Maite Murphy, Circuit Court Judge

Appellate Case No. 2017 – 001595
Lower Court Case No. 2009-CP-38-1261

Willie Bell, Jr., #254817,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Whether the lower court erred in failing to grant a new trial on matters related to an undisclosed pathology report contained in the Coroner's file.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Petitioner was indicted at the April 2006 term of the Orangeburg County Grand Jury for Murder (2006-GS-38-0751). He was represented by Margaret E. (Peggy) Hinds, Esquire, and R. Douglas Mellard, Esquire. Petitioner proceeded to a jury trial before the Honorable James C. Williams, Jr. where he was found guilty, and on March 15, 2007, was sentenced to fifty (50) years' imprisonment.

A notice of appeal was filed and an appeal perfected by Robert M. Dudek, then Deputy Chief Appellate Defender for Capital Appeals of the South Carolina Commission on Indigent Defense of the Division of Appellate Defense. Petitioner's conviction and sentence were affirmed. State v. Bell, Op. No. 2009-UP-325 (S.C. Ct. App. filed June 15, 2009). The remittitur was sent on July 1, 2009.

Petitioner subsequently filed an application for post-conviction relief on July 29, 2009. On May 20, 2015, an evidentiary hearing was held before the Honorable Maite Murphy. At the PCR hearing, Petitioner testified on his own behalf. Also testifying were Counsel Mellard, Counsel Hinds, Sean Fogle of the Orangeburg County Coroner's Office, Dr. John David Wren of Carolinas Pathology Group, Pete Skidmore, and Petitioner's aunts, Annie Wallen and Jannie Simmons. On September 15, 2015, Judge Murphy issued an Order of Dismissal, denying relief. Petitioner then served and filed a notice of appeal to the South Carolina Supreme Court. A Petition for Writ of Certiorari was filed on December 18, 2017. This Return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

Petitioner failed to prove that the solicitor committed a Brady violation and that Counsel were ineffective in their investigation into the case.

Petitioner makes two arguments regarding both the solicitor's and Counsels' handling and performance of issues relating to a purport original autopsy report. Petitioner argues the PCR Court erred in not finding the solicitor committed a Brady violation by failing to obtain and disclose the disputed report. Next, Petitioner argues Counsel were ineffective for failing to obtain the report and utilize it in their defense. These arguments lack merit. First, Petitioner conceded that the solicitor had no knowledge of and never had possession of the report, so he therefore could not have intentionally suppressed it from the defense. Second, Counsel acted within the prevailing professional norms in their investigation into the case. Third, the report was merely cumulative to other evidence elicited by Counsel and to Counsel's strategy and argument that disputed the victim's cause of death throughout the trial. Finally, there is overwhelming evidence of Petitioner's guilt that precluded a grant of relief under both issues.

A. Relevant Law

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in

the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). With respect to guilty plea counsel, the applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

B. How the Issue was Raised at Trial

Petitioner was convicted of murdering his grandmother, Ammie Bell[1] (victim) on March 9, 2006. The victim's body was found burned in her home beyond recognition. (App. p. 235-36). Arson investigators were called to the scene and determined that the home had been intentionally set on fire. (App. p. 419-21). The fire started on and around the victim's bed, and a trail of accelerant led from her bed, out of the bedroom, and down the hall to the front door of the house, according to investigators. (App. p. 419-21; 443). Investigators learned that Petitioner lived in a trailer directly behind the victim's home. (App. p. 204-05; 266). In addition to the victim's car being missing at the scene, so was Petitioner. (App. p. 215). That morning, between 9:00 am and 10:00 am, Petitioner picked up a friend in the victim's missing car and dropped him off at a nearby store. (App. p. 259-63).

After the victim was identified, a visitation and funeral were held. (App. p. 217-18). Petitioner did not attend the visitation or funeral for his grandmother even though she had raised him since he was a young child. (App. p. 217-18). Suspiciously, Petitioner did not contact any of his family members regarding his grandmother's death. (App. p. 217-18). Meanwhile, Petitioner was traveling between Orangeburg County and Augusta, Georgia while on a crack cocaine binge. (App. p. 385-96; 398-404). During the binge, Petitioner sold his grandmother's car to a local Augusta drug dealer for one-hundred and eighty dollars ($180.00) worth of crack cocaine.

[1] The victim is also referred to in the trial transcript as Anna Bell or Miss Anna Bell.

(App. p. 385-396). Petitioner actually signed a false bill of sale that stated he was paid one-thousand five hundred dollars ($1,500) for the car. (App. p. 390-392). Investigators eventually recovered the victim's car at a motel in Augusta and also recovered the clothes that Petitioner was wearing during the week following the fire. (App. p. 336-42; 446). Located on Petitioner's pants was a drop of blood that was a scientific match, through DNA analysis, to the victim. (App. p. 519-20). After selling his grandmother's car, Petitioner obtained a ride from the same drug dealer back to Orangeburg County. (App. p. 392-93). Petitioner was engaged in smoking crack cocaine throughout this period. (App. p. 397-404). The drug dealer returned to Augusta when a friend notified him by phone that he had seen on television that Petitioner was wanted for murder. (App. p. 393).

Lieutenant Craig Collier testified to the circumstances of Petitioner's arrest. Lt. Collier received a tip that Petitioner was driving in the area. (App. p. 446-447). Petitioner spotted the officers and fled at a high rate of speed in a white pickup truck. (App. p. 446-47). Petitioner was arrested only after he wrecked the vehicle into a telephone pole. (App. p. 446-47). While in custody, Lt. Collier testified Petitioner gave a brief oral statement that he did not *stab* the victim. (App. p. 452). Lt. Collier testified that when confronted about his statement, Petitioner explained that he heard about the victim's stabbing on the television. (App. p. 452). Significantly, Lt. Collier noted that the investigation had not yet revealed that the victim had been stabbed, so he knew Petitioner was not being truthful. (App. p. 452, line 15 – p. 453, line 15). Lt. Collier testified he then called and confirmed with Dr. Janice Ross, the pathologist, that the victim was stabbed in the back. (App. p. 453, lines 13-17). Dr. Ross testified in her opinion the victim died as a result of blunt force trauma of undetermined origin. (App. p. 476). She concluded the manner of death was homicide. (App. p. 478). She testified that no soot was found in the victim's

airways and that she had no doubt the fire had nothing to do with her death. (App. p. 478). She also testified there was a stab wound to the victim's back wall of the left chest and that there was bruising around that area so the victim would have to have been alive when she was stabbed. (App. p. 475). George E. Bonnete, a deputy coroner, believed the victim died from blunt force trauma to the *head* as parts of the victim's skull were missing. (App. p. 249-50).

C. Discussion

1. Petitioner failed to carry his burden in proving the solicitor committed a Brady violation.

Brady[2] requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985).

Petitioner agreed to stipulate at the PCR hearing that the solicitor never had possession of and did know about the disputed autopsy report. See (App. p. 801; 919-22). Therefore, there is probative evidence to support the PCR Court's finding that Petitioner failed to meet his burden that the report was suppressed by the solicitor. Furthermore, this evidence was available to Counsel at the time. See State v. Moses, 390 S.C. 502, 519-20, 702 S.E.2d 395, 404 (Ct.App.

[2] Brady v. Maryland, 373 U.S. 83 (1963).

2010) ("Moses failed to show that he could not obtain other evidence of comparable value by other means; in fact, the State provided defense counsel with a high school yearbook to help Moses in identifying other witnesses who were present in the cafeteria") (citing United States v. Wilson, 901 F. 2d 378, 380-81 (4th Cir. 1990); Anderson v. Leeke, 271 S.C. 435, 438-39, 248 S.E.2d 120, 122 (1978) ("Although not expressly stated in the opinion, we think it is implicit that the Brady rule applies only to favorable evidence which the prosecution has but which is Unavailable [sic] to the defendant") (citing DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975) and United States v. Soblen, 301 F.2d 236 (2nd Cir. 1962), cert. denied, 370 U.S. 944, 82 S.Ct. 1585 (1962)); Anderson, 271 S.C. at 439, 248 S.E.2d at 122 ("We think it is inferable ... that where evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved"). Here, Counsel could have subpoenaed the coroner's file and obtained the report. So really, the more appropriate analysis is whether Counsel were ineffective in failing to obtain it. That allegation is discussed in the next section below.

Considering the other factors, Petitioner did not prove that the report was actually favorable to his case and defense or that it was material to his guilt or innocence. Petitioner failed to present any credible evidence that Counsel's cross examination of the pathologist would have likely changed any aspect of the case. See Butler, 286 S.C. 441, 334 S.E.2d 813 (1985) (noting that applicants bear the burden of proving their allegations). Here, we are left to speculate as to what the report represents and how it came about. See Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice). For all we know the report may very well have been a draft that the pathologist included in her production to the coroner's office which she could have easily explained. Moreover, the pathologist issued an amended report after

learning about Petitioner's statement that he stabbed the victim which allowed Counsel to consistently argue to the jury that the pathologist's report was not convincing.

2. Counsel conducted a reasonable investigation into the case; furthermore, Petitioner cannot show that the disputed autopsy report would have had any effect on the trial.

The PCR Court was correct in finding that it was not within the professional norms for a defense attorney to subpoena the entire coroner's file. Counsel Hinds testified to this not being the norm in her experience. (App. p. 825). Petitioner failed to present any other evidence showing that defense counsel should be required to subpoena these types of documents in homicide cases, especially when considering the various inconsistencies already known to the defense in this case.

Counsel's main strategy was to call into question the pathologist's findings by questioning how she determined the victim's cause of death. (App. p. 818-20; 905-06). This was done successfully throughout the trial, in opening, on cross examination, and in closing arguments.

In opening Counsel Hinds stated:

> This was not labeled a homicide until the pathologist did an amended report a while later. And in that amended report, which did say at that point, homicide. You're going to hear testimony that the reason for that change was because of the arson investigation. In other words, once it was determined that the fire was probably set, it was the pathologist's opinion, that therefore, it was a homicide. So, in other words, if there had been no arson there would be no murder. That's kind of like the tail wagging the dog. The pathologist is going to testify to you that Ms. Bell died of undetermined trauma, undetermined trauma. It's a fancy way of saying they don't know how she died. Certainly, they don't know why.

(App. p. 171, lines 9-22). This demonstrates that Counsel effectively highlighted the inconsistencies in the State's theory of how the victim died. Counsel Mellard also highlighted the inconsistencies during his cross examination of the pathologist. Dr. Ross testified that she only

examined the victim's body one time and the report was amended without an additional examination of the body. (App. p. 482, lines 11-13; p. 484, lines 10-12). Counsel Mellard even elicited testimony from Dr. Ross that her "conclusion was based in part on the fact that the police had decided that arson was involved." (App. p. 484, lines 17-20).

Counsel Hinds argued these inconsistencies in closing as well. She argued the coroner felt that the victim must have been killed by blunt force trauma, but highlighted that that's not what the experts confirmed. (App. p. 586-87). Counsel Hinds noted that the coroner was not an expert and was merely speculating. (App. p. 586-87). Counsel Hinds argued in closing:

> When pressed, the pathologist did say, could have been blunt force trauma, but she didn't say it was, she said it could have been. As a matter of fact, there was, there's been speculation, there was one puncture wound, was she stabbed to death? Nobody knows. Was she hit – the coroner seems to think she was hit over the head. Everybody's got a theory, nobody can tell you for sure. You heard the pathologist testify that the reason that the amended report was changed from "pending investigation" to the homicide label was because of the determination that the fire was an arson related fire. That was the only reasons, ladies and gentleman. They didn't – she didn't re-examine the today, they didn't do another physical examination, it was strictly because of the arson determination. All she can do is guess. Even an educated guess is just a guess. According to the pathologist, if there had not been an arson determination there would have been no murder, which is interesting. As we're in this courtroom today, Willie Bell is being tried for murder, he is not being tried for arson. At the end of her testimony she states that there was no mistake on the March tenth report, it was a trauma of undetermined original, she didn't know.

(App. p. 594-95).

The PCR Court also found that an attempt by Counsel Mellard to question Dr. Ross regarding the disputed report at issue would be cumulative to the numerous inconsistencies presented by Counsel. See Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) (no prejudice from not eliciting cumulative information.). That is a sound finding and is supported by the evidence. The pathologist's findings were called into question throughout the trial and even by the coroner himself. In addition, Counsel was able to focus on the fact that the pathologist

changed her conclusion on cause of death just by receiving a phone call from investigators. Any further questions to the pathologist on this issue would be cumulative to the evidence already before the jury.

Finally, despite Petitioner's characterization of the prejudice analysis as "ridiculously improper," the PCR Court conducted the proper two-step Strickland analysis. The prejudice prong was thoroughly examined, and the PCR Court correctly found that there was overwhelming evidence of Petitioner guilt. Testimony showed that Petitioner had lived with the victim his entire life but after she was found murdered, he had fled and not returned. "Flight from prosecution is admissible as evidence of guilt." State v. Walker, 366 S.C. 643, 654, 623 S.E.2d 122, 127 (Ct. App. 2005). "In South Carolina, we recognize that evidence of flight [is] proper [and] [w]e also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight." Id.; citing State v. Byers, 277 S.C. 176, 177 – 178, 284 S.E.2d 360, 361 (1981). Petitioner did not attend the victim's visitation or funeral. (App. p. 217, lines 6 – p. 218, line 13). He also did not make any contact with any family members after the incident. (App. p. 217). Petitioner took the victim's car the night the victim was killed and the car was finally recovered in Augusta, Georgia six days later. (App. p. 336-37; p. 446, lines 1-4). Kareem Taylor testified that Petitioner sold the victim's car for around $180 worth of crack cocaine. (App. p. 390, lines 4-13). James Gilmore, a high school friend of Petitioner's, testified that Petitioner had a crack problem and was angry and moody when he was on crack. (App. p. 273).

Also, when Petitioner was spotted by authorities, he fled. (App. p. 446-47). The prosecution presented DNA evidence which strongly implicated Petitioner in the murder. SLED Agent Adrienne Riley testified as an expert regarding the DNA analysis done on Petitioner's

clothing. (App. p. 511). She testified the blood found on Petitioner's sweat pants was a direct *scientific match* to the victim. (App. p. 518-20). There was also blood found on Petitioner's left tennis shoe which Agent Riley determined the victim could not be excluded as a match. (App. p. 521). Finally, while housed at the Orangeburg County Correction Facility, Petitioner told Victoria Baskin, at the time a medical officer, that if she did not comply with his requests to give him medications, then he would kill her like his killed his mother.[3] (App. p. 307).

Examining all of the evidence presented, it is overwhelming and precluded a grant of relief even if we were to presume Counsel were ineffective. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt). "There must be a substantial likelihood of a different result." Harrington v. Richter, 562 U.S. 86, 90, 131 S. Ct. 770, 779 (2011).

[3] Petitioner called the victim "Mom" because she raised him. She was actually his grandmother. See App., generally.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

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BY: _____
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April 18, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari from Orangeburg County
Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2017-001595

WILLIE BELL, JR., #254817, PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, RESPONDENT,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
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This 18th day of April, 2018

TAMIEKA RUSSELL-BROWN
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

April 18, 2018

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Willie Bell, Jr., #254817 v. State of South Carolina**
Appellate Case No. 2017-001595
Lower Court Case No. 2009-CP-38-1261

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Clay Mitchell
Assistant Attorney General
SC Bar No. 101443

CM/trb
Enclosures

cc: Tricia A. Blanchette, Esquire (2 copies)
Victim Advocacy Division